No. 83-319

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARSHALL STILLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's findings as to the existence of a conspiracy and petitioner's connection with it were sufficient to permit admission in evidence of co-conspirator statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

2. Whether petitioner was deprived of his right to confrontation under the Sixth Amendment by admission of co-conspirator statements.

3. Whether the trial court improperly limited petitioner's impeachment of a hearsay declarant and a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-65) is reported at 714 F.2d 238.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on June 30, 1983. A petition for rehearing (Pet. App. 66) was denied on July 22, 1983. The petition for a writ of certiorari was filed on August 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner and three others were convicted of conspiracy to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C. 846 (count one), and with conspiracy to import heroin into the United States, in violation of 21 U.S.C. 963

(count two). Petitioner was sentenced to concurrent terms of 12 years' imprisonment on each count and fined $10,000 on count one. Pet. App. 3, 6.

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 3-7), established a conspiracy to import heroin from Lebanon through Toronto and New York and to distribute it in the United States. The central figure in the conspiracy was co-conspirator Ghassan Ammar, who lived with his wife, co-conspirator Judith Ammar, in Erie, Pennsylvania. Ghassan Ammar obtained his heroin supply from three co-conspirators — his father, Ibraham; his uncle, Abedeen; and Naim Dahabi.[1]

In January 1980, at a meeting attended by Ghassan Ammar, Judith Ammar, and unindicted co-conspirator John Welkie, Ghassan Ammar told Welkie that his father and uncle could supply heroin for importation into the United States. In May 1980, Ghassan and Judith Ammar met Ghassan's uncle, Abedeen Ammar, at the Toronto airport and brought him back to Erie, together with his luggage, which contained heroin in hollowed-out chair legs.

In June 1980, Welkie and Ghassan Ammar met with co-conspirators Charles Rossi and Michael Dugan and arranged for Dugan and Rossi to go to Amsterdam with Ghassan and Judith Ammar and their infant son. Dugan and Rossi waited in Amsterdam while the Ammars went on to Lebanon to obtain heroin, which Ghassan said was for someone in Detroit. Pet. App. 4; Tr. 94-96; Welkie Tr. 40-42.[2] Ghassan and Ibraham Ammar rejoined Dugan and

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[1]These three co-conspirators were fugitives at the time of trial (Pet. App. 3).

[2]"Tr." refers to the consecutively-paginated 25-volume transcript of the bulk of the trial. "Welkie Tr." refers to the separately-paginated two-volume transcript of most of the testimony of John Welkie. The appendix filed in the court of appeals by petitioner is designated "Stillman App."

Rossi, and the four flew to New York, again with heroin concealed in hollowed-out chair legs. From New York, they drove to Rossi's home in Chester, Pennsylvania, and from there Ibraham Ammar, Ghassan Ammar, and Rossi flew to Detroit. Pet. App. 4. They met petitioner in a hotel lobby, and the Ammars went with him to the hotel restaurant (Tr. 103-120).

Rossi and the Ammars returned to Erie, and Ghassan told Rossi he had left heroin with petitioner. A few days later, they returned to Detroit. On the way, Rossi saw heroin in the trunk of the car. Pet. App. 18; Tr. 140-142. After receiving a telephone call in Detroit, Ghassan Ammar told Rossi that petitioner and a friend were there to meet with the Ammars. The Ammars later instructed Rossi by telephone to come to the hotel lounge and give heroin to a man introduced to him as "Jim," and Rossi did so. Tr. 143-144.

In July 1980, Ghassan Ammar flew to Beirut, where he rejoined his wife and son. They returned to New York on July 4, with heroin concealed on Judith Ammar's person and in the baby's diapers. They were met by Rossi, Welkie, and Ibraham Ghassan. In mid-July, at Ghassan Ammar's suggestion, Rossi again flew to Beirut, where he acquired additional heroin from Ibraham and Abedeen Ammar. Thereafter, at Ghassan Ammar's suggestion, Rossi again flew to Beirut, where he acquired additional heroin from Ibraham and Abedeen Ammar. Ghassan Ammar, Welkie, and unindicted co-conspirator Gilbert Bunner then drove to Detroit. There, Welkie gave Ghassan Ammar some heroin, which Ghassan Ammar sold to petitioner. Pet. App. 4; Tr. 2771-2774; Welkie Tr. 72-86. After receiving a telephone call from Judith Ammar, the three returned to meet Judith Ammar in Erie and drove to Canada to pick up Naim Dahabi, who again had heroin concealed in hollowed-out chair legs (Pet. App. 4). Welkie and Bunner took the

bag containing the chair legs across the border in a bus (Tr. 2777-2780; Welkie Tr. 89-94). All five then went to Detroit, where Ghassan Ammar, Dahabi, and Welkie met with petitioner (Pet. App. 4-5). Pursuant to petitioner's instructions, Welkie delivered heroin to the front seat of a car driven by petitioner's friend (Pet. App. 5; Welkie Tr. 100-103).

During this time, Ghassan Ammar and co-defendant Neil McFayden made sales of heroin to McFayden's friend "Frank," who was in fact Francis Schmotzer, an undercover agent of the Drug Enforcement Administration. On July 31, Ghassan Ammar, McFayden, Welkie, and Bunner arranged a third sale to Schmotzer. McFayden and Bunner were arrested immediately; Ghassan Ammar (who had not been present at the sale) and Welkie surrendered later. On August 29, a four-count indictment was returned against Ghassan Ammar, McFayden, and Welkie. The indictment named Bunner as an unindicted co-conspirator. Rossi and Dugan were arrested on August 12 while trying to sell heroin to a state undercover agent in order to raise money for Welkie's bail. Rossi, who had brought that heroin back from Lebanon, was released but continued to sell heroin and was arrested again on October 2. Welkie was released after agreeing to cooperate with the government, and Judith Ammar was arrested after she asked Welkie to sell heroin to raise bail for Ghassan Ammar. Petitioner was arrested in Detroit on October 15. Pet. App. 5.

2. On appeal, petitioner raised more than 40 issues (see Pet. App. 52-56), including those raised in his petition. Petitioner's appeal was consolidated with those of three co-defendants. Rejecting every argument of the defendants (Pet. App. 1-65) the court of appeals affirmed the convictions. Among other things, the court found (Pet. App. 8) that the trial court had met the requirement set forth in *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), that,

"as a prerequisite for the submission of co-conspirator statements to the jury, the court must determine the government has 'established the existence of the alleged conspiracy and the connection of each defendant with it by a clear preponderance of the evidence independent of the hearsay declarations.' " One member of the panel, while concurring in the decision, expressed the view that the court of appeals should modify its holding in *Continental Group* and at least require the district court to consider holding a hearing outside the jury's presence before admitting co-conspirator statements (Pet. App. 65).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court improperly admitted the out-of-court statements of co-conspirators without making a finding that the government had satisfied the evidentiary predicate for admission of those statements. Petitioner's argument lacks merit.

The court of appeals concluded, after examining the record, that the district court had made the necessary determination before admitting the co-conspirator statements (Pet. App. 11) and noted that the district court had so stated explicitly on the record on several occasions (see *id.* at 11 & n.6). The court of appeals' conclusion was correct, as its opinion demonstrates (*ibid.*), and in any event this fact-bound issue does not warrant further review.

Petitioner incorrectly suggests (Pet. 12) that the decision below conflicts with *United States* v. *James*, 590 F.2d 575, 582-583 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), and *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). *James* held that the trial court must determine whether the evidentiary predicate for admission of co-conspirator statements has been satisfied and that this determination may be made either before the statements are related in testimony or after they are conditionally received.

See also *United States* v. *Montemayor*, 703 F.2d 109, 116-117 (5th Cir. 1983). As noted, such a determination of admissibility was made here. In *Bell*, "[f]or the purpose of providing guidance to the district courts in future trials," the court prescribed steps to be taken before co-conspirator statements are admitted subject to later connection (573 F.2d at 1044). Among other things, the court stated (*ibid.*) that the parties should be cautioned that an "explicit determination for the record regarding the admissibility of the statement" would be made at the conclusion of the evidence. Here, as the court of appeals noted (Pet. App. 11, quoting Tr. 4712), "at the charging conference the judge stated that he had made 'the determination that there was threshold evidence of the conspiracy * * * rather early in the case, the second or third day.' "

Petitioner contends (Pet. 10) that the trial court erred in refusing to conduct a hearing on the admissibility of the co-conspirator statements. But under Rule 104(c) of the Federal Rules of Evidence, a trial judge required to decide whether to admit evidence other than a confession has discretion to receive proof during trial concerning the admissibility of that evidence or to hold a hearing outside the jury's presence. In this case, petitioner has not shown any reason why the trial judge's decision not to hold a hearing constituted an abuse of discretion (see Pet. App. 10).[3]

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[3]In our view, the order of proof at trial when co-conspirator declarations are offered is a matter best left to the sound discretion of the district court, as is the question whether to hold a hearing prior to admitting such evidence subject to later proof of the conspiracy and the defendant's participation therein. Such hearings would frequently prove wasteful and duplicative of almost the entire trial itself. In any event, even assuming that the district court committed error in the procedures it followed relating to its admission of co-conspirator declarations, any such error was in retrospect harmless given the fact that, by

Finally, petitioner suggests (Pet. 10-11) that the trial judge improperly shifted to the jury the responsibility to rule on the admissibility of the co-conspirator statements. Petitioner notes (Pet. 10) that the court instructed the jury at the time the co-conspirator statements were admitted not to use that evidence against petitioner until there was more to connect him to the conspiracy. But, as previously noted, the judge himself subsequently determined that such evidence had been introduced. Petitioner also relies (Pet. 11) on the final instructions in which the court told the jury not to consider the co-conspirator statements against petitioner unless it found him to be a member of the conspiracy. But this instruction, which came after the judge had already made all the required findings concerning the conspiracy, was merely a windfall to petitioner. It did not shift the judge's responsibility to the jury; instead, it let the jury second guess the accuracy of the judge's ruling. See *Continental Group, Inc.*, 603 F.2d at 459, and cases cited. Only the prosecution would have standing to complain of such an error.[4]

2. Petitioner incorrectly contends (Pet. 13-18) that Fed. R. Evid. 602 and the Confrontation Clause of the Sixth Amendment were violated because the trial court admitted the out-of-court statements of co-conspirators without requiring proof that they had personal knowledge concerning the subject of the declarations.

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the time the case went to the jury, the prosecution had indeed adduced sufficient independent evidence to justify admission of the co-conspirator statements. No court has reversed a conviction on this basis, and it would indeed be pointless to order a new trial knowing that the same evidence would be admissible and admitted at that trial.

[4]While raising the technical arguments noted above, petitioner does not contend that the independent evidence of the conspiracy was insufficient to permit admission of the co-conspirator statements. As the court of appeals concluded (Pet. App. 16-19), this evidence was sufficient.

First, petitioner's factual assertion that the co-conspirator statements were made without firsthand knowledge is contrary to the court of appeals' finding that the statements of Ghassan, Ibraham, and Abedeen "appear to have been based on first-hand knowledge" (Pet. App. 32). The court of appeals also concluded (*id.* at 33) that McFayden's statements were cumulative and "could not have impermissibly prejudiced [petitioner]." These fact-bound determinations, which remove the predicate for petitioner's contention, are not suitable for review by this Court.

In any event, proof of firsthand knowledge is not required for admission of co-conspirator statements under Fed. R. Evid. 602. As the court of appeals held (Pet. App. 26-27), Rule 602 does not apply to co-conspirator statements, which are classified as admissions by Rule 801(d)(2)(E). Following the traditional rule (see *McCormick on Evidence* § 262, at 628 (2d ed. 1972)), the Advisory Committee note on Rule 801(d)(2) states:

> No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from * * * the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

See also *Mahlandt* v. *Wild Canid Survival and Research Center, Inc.*, 588 F.2d 626, 630-631 (8th Cir. 1978) (personal knowledge requirement does not apply to Fed. R. Evid. 801(d)(2)(D)); *United States* v. *Lang*, 589 F.2d 92 (2d Cir. 1978).

The reasons for this rule are apparent. Three principal bases for the co-conspirator rule are often advanced: the theory that conspirators are each other's agents; the belief

that such statements when made in order to further the conspiracy are usually true, because otherwise they would not serve their intended purpose; and the difficulty of proving conspiracies without relying upon such evidence. See 4 *Weinstein's Evidence* para. 801(d)(2)(E)[01] (1981).

Applying the personal knowledge requirement of Rule 602 would be inconsistent with all three of these rationales. If agency principles make co-conspirators responsible for each other's statements, Rule 602 should apply equally to a party's own admissions and those of his co-conspirators; and even petitioner concedes (Pet. 15) that Rule 602 does not apply to a party's own admissions. If co-conspirator statements are admissible because they are believed to be inherently reliable, the personal knowledge requirement is superfluous. And if the basis for admitting co-conspirator statements is the difficulty of proving conspiracies without such evidence, application of Rule 602 would frustrate that objective, since a co-conspirator whose statement is offered will generally be unavailable for examination by the prosecution abo . the basis for his statement, either because he is a defendant, is claiming the Fifth Amendment privilege, or is a fugitive.

Petitioner's Confrontation Clause claim is equally without merit. The co-conspirator statements were made by declarants who were unavailable to testify, either because they were being tried jointly with petitioner or because they were fugitives. And, as previously noted, the court of appeals found (Pet. App. 32; footnote omitted) that those statements were reliable because "[t]hey appear to have been based on first-hand knowledge, they were made under circumstances which suggest little incentive for prevarication, and they were corroborated by other evidence." See also *id.* at 32 n.16. In view of these findings, there is plainly

no inconsistency between the decision below and *Dutton* v. *Evans*, 400 U.S. 74, 87-89 (1970), upon which petitioner relies (Pet. 16-17).

3. Contrary to petitioner's argument (Pet. 19-20), his Confrontation Clause rights were not violated when the trial court refused to admit evidence offered by petitioner to attack the credibility of Ghassan Ammar, who did not testify but whose out-of-court declarations were admitted under the co-conspirator rule. Petitioner sought to question Welkie about Ghassan Ammar's conviction record, but the court refused to permit such inquiry (Tr. 445). The court allowed petitioner to question Rossi about Ghassan Ammar's reputation for truthfulness (Tr. 445) but barred similar questions addressed to another witness who did not testify to any co-conspirator statements made by Ghassan Ammar (Tr. 2576-2581).

In the first place, any possible error was plainly harmless. The fact that Ghassan Ammar previously had been convicted of a drug offense was amply demonstrated at trial. Ammar's defense was that his participation in the offense in this case was part of his cooperation with the government arising from his prior prosecution (see Tr. 3285, 3427).

Moreover, petitioner never sought to prove Ghassan Ammar's prior convictions in a proper manner. Rule 806 of the Federal Rules of Evidence permits an attack on the credibility of a hearsay declarant "by any evidence which would [have been] admissible for [that purpose] if declarant had testified as a witness." And under Rule 609(a) of the Federal Rules of Evidence, evidence of a prior conviction may be used for impeachment purposes either by cross-examining the convicted witness or by a public record. Since Ghassan Ammar did not testify, the former method was unavailable to petitioner, but petitioner could have employed the latter. Instead, he improperly attempted to

elicit the information from Welkie. Such testimony by Welkie would have been inadmissible hearsay.[5]

4. Finally, petitioner contends (Pet. 21-22) that the trial judge improperly refused to permit cross-examination of prosecution witness Welkie based upon prior inconsistent statements made to a DEA agent. However, the court of appeals correctly found (Pet. App. 18) that "there was ample cross-examination as to * * * Welkie's prior inconsistent statements to government officials" and that additional cross-examination on this matter would have been cumulative.[6] The court of appeals' ruling on this fact-bound question does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

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[5] At trial, petitioner's counsel incorrectly suggested that statements by Ghassan Ammar to Welkie concerning Ammar's criminal record would have been against Ammar's penal interest. Acknowledgement of a prior conviction does not subject a declarant to criminal liability.

[6] Petitioner sought unsuccessfully to impeach Welkie by using material in DEA Agent Schmotzer's notes (Tr. 2708-2709), but the trial court found that those notes did not contain Welkie's "statements" under 18 U.S.C. 3500 and refused to permit cross-examination based upon them (see Pet. App. 6 n.4). Petitioner was able to cross-examine Welkie as to prior inconsistent statements contained in investigation reports, as opposed to the agent's notes. Petitioner has never offered any reason to believe there was any information in the notes that was not reflected in the reports.

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